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No. 80-1341

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AARON CLINTON ATKINS,
Petitioner,

v

MICHIGAN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BELL AND HUDSON, P.C.

By: Edward F. Bell (P10652)
Attorney for Petitioner,
Aaron Atkins
840 Buhl Building
Detroit, Michigan 48226
313-962-2240

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
962-8745 962-8746

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS CAN GRANT A LESS DRASTIC REMEDY THAN DISMISSAL WHERE THE COURT OF APPEALS HAS DETERMINED JUDICIALLY THAT THE PETITIONER HAS BEEN DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

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AARON CLINTON ATKINS,
Petitioner,
v
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, AARON CLINTON ATKINS, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 2, 1981.

ORDER BELOW

The Opinion of the Court of Appeals of March 2, 1981 is set forth in Appendix A.

JURISDICTION

On March 2, 1981, the Court of Appeals for the Sixth Circuit entered Judgment affirming in Part and Reversing in Part the District Court's Judgment with respect to Petitioner. The Court of Appeals affirmed the District Court's finding that Petitioner had been denied his right to a speedy trial under the Sixth Amendment to the United States Constitution. The Court of Appeals reversed the District Court's order of dismissal and gave the prosecution sixty (60) days in which to bring the defendant to trial or to dismiss the case. This Petition for Certiorari is being filed within the specified time period. This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254 (1) (2) (3) (4) (5).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in part, that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

STATEMENT OF THE CASE

On January 22, 1979, Aaron Clinton Atkins voluntarily presented himself, with his attorney, for arraignment on a charge of first-degree murder which had been brought against him by the People of the State of Michigan. A Magistrate of the Recorder's Court for the City of Detroit

arraigned Mr. Atkins on January 22, 1979, on the charge of the murder of one Girard Tolbert, who had been found by the Wayne County Medical Examiner to have died of a drug overdose in 1974. The Magistrate remanded Mr. Atkins without bond to the Wayne County Jail. The following date, Recorder's Court Judge Dalton Roberson set a fifty thousand dollar ($50,000.00) two surety bond on motion of Mr. Atkins' attorney. Although the people alleged in their brief that the order was contrary to Michigan law, no appeal was taken. Mr. Atkins preliminary examination, for which he again voluntarily presented himself, was held by Judge Clarice Jobes on January 31, 1979. At that time, Mr. Atkins was bound over and again remanded to the Wayne County Jail without bond. On February 6, 1979, the trial Judge to whom the case was assigned, Judge Evelyn Cooper, reinstated the bond previously set by Judge Roberson, and that same day, the Wayne County Prosecutor on behalf of the People of Michigan, filed an emergency application for leave to appeal in the Michigan Court of Appeals. Within three days, on February 9, 1979, and without the benefit of a transcript of the Recorder's Court Hearing as required by the Michigan General Court Rules, the Michigan Court of Appeals issued a summary order granting immediate leave to appeal and ruling:

> "It is further ordered that the bond set by the trial court in this cause be, and the same is hereby, ordered cancelled (sr) and the Defendant is hereby ordered remanded to the Wayne County Jail."

No findings of either an abuse of discretion or of any other matters were made.

Aaron Atkins voluntarily surrendered himself again after this bond cancellation. A trial date was set for April 5, 1979, and a series of pretrial evidentiary motions were heard in the interim. On the date of trial, when the jury selection process was to commence, the Wayne County Prosecutor filed and served a written motion requesting that the court rule upon the admissibility of the "similar acts" testimony of a previously endorsed witness, Levi Williams. Despite the objections of defense counsel that the motion cut-off date had passed, that the requisite four-day notice had not been given and that the motion raised questions which could be resolved in the course of the trial, the trial Judge adjourned the trial and took the motion under advisement. On May 14, 1979, the trial Judge denied the prosecution's motion and set a new trial date of May 30, 1979. However, on May 18, 1979, the People filed an emergency application for leave to appeal the trial Judge's ruling. On May 24, 1979, the Court of Appeals granted the prosecution's motion for immediate consideration of the interlocutory appeal, granted a stay of trial pending appeal, and halved the time in which the parties were to file their briefs. As with the first Court of Appeals order, no grounds for the order were stated. The matter was, however, not treated on an expeditious basis by the Court of Appeals.

On August 30, 1979, Judge Cooper heard arguments on Mr. Atkins motion to dismiss for denial of his right to a speedy trial. She denied that request, but made findings on the record that circumstances had changed since the Court of Appeals cancellation of bond on February 9, 1979, and for stated reasons including Mr. Atkins' history of three voluntary surrenders during the pendency of the charges, and that he had been incarcerated for more than six months, ordered a fifty thousand dollar ($50,000.00) ten-percent (10%) bond.

Mr. Atkins was free on the fifty thousand dollar ($50,000.00) ten-percent (10%) surety bond set by Judge Cooper from August 30, 1979 until September 12, 1979, when the Court of Appeals again issued a summary order cancelling bond and remanding him to the Wayne County Jail. Mr. Atkins again surrendered himself voluntarily. The Court of Appeals again made its decision without a transcript as required by law and made no findings as to an abuse of discretion by the trial Judge, or any other pertinent factors. The Court merely granted immediate consideration, and emergency application for leave to appeal, and stated:

> "It is further ordered that the order of the trial judge setting bond be, and is hereby set aside and the bond cancelled. Defendant is ordered remanded to the custody of the Wayne County Sheriff, pursuant to this Court's order of February 9, 1979."

After his fourth voluntary surrender, Mr. Atkins filed an emergency application for leave to appeal to the Supreme Court of Michigan, which was denied on November 2, 1979, with the following statement:

> "The emergency application for leave to appeal is denied, because the Court is not persuaded that the questions presented should be reviewed by this Court."

On November 19, 1979, Mr. Atkins filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. On April 7, 1980, a show cause hearing was held before United States District Judge Anna Diggs Taylor and petitioner's counsel argued the merits of their claims. Judge Taylor adjourned arguments until April 14, 1980, so that the

respondent could prepare a response. Upon completion of respondent's arguments, Judge Taylor informed the parties that she would issue her opinion on April 15, 1980. On April 15, 1980, Judge Taylor granted petitioner's relief and found that petitioner had been denied his right to a speedy trial.

On April 18, 1980, the People appealed the District Court's ruling to the United States Court of Appeals for the Sixth Circuit. On March 2, 1981, the Court of Appeals issued its opinion affirming in part and reversing in part the District Court's findings.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is Inconsistent With The Decisions Of This Court And Other Circuits Dealing With Violation Of A Defendant's Sixth Amendment Right To A Speedy Trial

The Court of Appeals opinion does not in context reverse the District Court decision. In fact, it totally agrees with the District Court's finding except that the District Court's remedy for denial of a speedy trial violation is consistent with that of the United States Supreme Court, whereas the Court of Appeals' remedy is totally inconsistent with the remedy mandated by the United States Supreme Court. The Court of Appeals tries to justify their decision on the theory that the District Court failed to address or consider the exhaustion of state remedies question. The Court states at (Tr. pg. 7):

> "The district Court treated the petition as requesting dismissal and, without consideration of the exhaustion question, proceeded to an analysis in light of the Baker criteria."

This must have been an oversight on the part of the Court of Appeals because at (Tr. pg. 15) of the District Court's opinion, Judge Taylor addresses the question of Petitioner's exhaustion of state remedies by stating:

> "This Defendant, Petitioner Atkins', assertion of his right to a speedy trial began with his objection to the People's untimely and unnecessary pretrial motion on the day of his scheduled trial, April 5, 1979, and has continued unflaggingly throughout this period. Petitioner's motion to dismiss for denial of speedy trial was denied by Judge Cooper in August, 1979, and although her new bail order was reversed, her refusal to dismiss was left undisturbed by the Court of Appeals' September Order, and by the Supreme Court of Michigan's rejection of Atkins' appeal in November.

If this Court will take note, not only was the Court of Appeals mistaken in its assertion that the District Court failed to address the exhaustion of state remedies question, but if this Court will note at (Tr. pg. 8) the Court of Appeals admits that Mr. Atkins exhausted all available state remedies and in its findings uses basically that same language as that of the District Court in its findings for its determination, by stating:

> "We find that Atkins diligently presented this constitutional claim in state court prior to his petition for habeas corpus and that therefore, he exhausted his available state remedies. In August, 1979, he moved the trial court to dismiss the indictment on speedy trial grounds or to release him on bail pending trial. At that point, the trial court, of course, had not the authority to order the prompt trial of Atkins in order to enforce the

> state's constitutional duty to do so, because at that time the state Court of Appeals was considering the prosecution's interlocutory appeal and could not be ordered by a trial court to speed up its process. When the Court of Appeals, however, considered the prosecution's appeal of the trial court's release of Atkins on bail and when the Michigan Supreme Court decided whether to permit Atkins to appeal the revocation of bail, both Courts had the opportunity to consider and were confronted by the specific argument, cite omitted, that the state was violating its duty to grant Atkins a prompt trial. After the State Supreme Court denied Atkins leave to appeal, no state avenue remained open to him to press his claim. Application for a writ of habeas corpus in this situation to consider whether the state violated its duty is proper, cite omitted."

As this Court can see, the Court of Appeals' assertion that the District Court failed to address itself to the exhaustion question is totally erroneous. Not only does the District Court address the question and reach the proper conclusion, the Court of Appeals addresses itself to the question and uses basically the same language as that of the District Court, in its determination that the Petitioner had exhausted all available state remedies.

The next question addressed by the Court of Appeals opinion is the issue of the reasonableness of the state delay in bringing Petitioner to trial. Again I ask this Court to note the basic similarity in the language used and conclusions reached by the District Court and the Court of Appeals. The District Court states:

> "The reason for the delay includes approximately four months prior to the initial trial date of April 5, 1978, which were spent in pretrial motions, and which is permissible delay. However,

> approximately eleven months since May 18, 1979, have been consumed by the Michigan Court of Appeals interlocutory consideration of the People's emergency appeal. This delay is impermissibly in derogation of Petitioner's right to a speedy trial.
>
> Accordingly, this Court finds the interlocutory appeal to have been an overlong delay, and an intrusion upon Atkin's constitutional right to a speedy trial." (Tr. 14 - 15).

The Court of Appeals addresses the unreasonable delay question in the following manner:

> "The eleven month pretrial delay following the appeal, however, is unexplained. In a similar situation both the Michigan Supreme Court and the Federal District Court for the Western District of Michigan have expressed the view that a violation of the right to a speedy trial can arise from the consumption of an excessive amount of time by the Appeals Court considering an interlocutory appeal. *People* v *Chism*, 390 Mich 104, 113, 211 NW 2d 193 (1973); *Chism* v *Koehler*, 392 F Supp 659 (W.D. Mich, 1975) aff'd, 527 F 2d 612 (6th Cir) cert denied, 425 U.S. 944 (1976). In the present case, we find that the time spent on appeal, when added to the previous four months delay, resulted in a violation of the duty of the state to bring Atkins promptly to trial."

In comparing both the District Court and the Sixth Circuit Court's opinions, it is evident that the language used is basically the same, but most important is the fact that the conclusions reached are exactly the same. Both courts agreed that Petitioner, Atkins, had been denied

his constitutional rights to a speedy trial. Thus, the Court of Appeals affirmed this portion of the District Court's Order.

The only difference in the two opinions is the remedy which followed their respective opinions. The District Court chose to follow the guidelines and mandate laid down by the U.S. Supreme Court in *Barker* v *Wingo*, 407 U.S. 514 (1972), and the opinion of Chief Justice Burger in *Strunk* v *United States*, 12 U.S. 434 (1973):

> "It is true that Barker described dismissal of an indictment for denial of a speedy trial as an 'unsatisfactorily severe remedy.' Indeed, in practice, it means that a defendant who may be guilty of a serious crime may go free, without having been tried." 407 U.S. 522. But such severe remedies are not unique in the application of constitutional standards. In light of the policies which underlie the right to a speedy trial, dismissal must remain, as Barker noted, 'the only possible remedy.' " Ibid.

The District Court followed the standards and the mandates laid down by the United States Supreme Court in both the *Barker* and *Strunk* cases, thus the only possible remedy left for the Court of Appeals to give once they had determined that Petitioner Atkins' rights to a speedy trial had been violated was to dismiss the charges against him. The Sixth Circuit Court, however, even though they reached the same conclusion that the District Court had reached namely that Mr. Atkins' right to a speedy trial had been denied, chose to fashion a remedy not cognizable by this Honorable body.

> "Because of a violation of the duty to try Atkins promptly had been found, however, we are

constrained to order that his trial commence within sixty days, to guarantee that no further infringement of his right to a trial occur." (Tr 10-10A).

The Court of Appeals has refused to acknowledge the mandates of the United States Supreme Court as laid down in the *Barker* and *Strunk* cases, namely once it has been judicially determined that a Defendant has been denied his rights to a speedy trial, *the only remedy is dismissal*. There is no authority to grant the violating party sixty more days to bring the Defendant to trial. In essence, what the Court of Appeals is doing is not reversing the District Court, *what they are actually doing is reversing the United States Supreme Court, which is totally outside of the realm of their jurisdiction*.

It is interesting and somewhat baffling to note the decision of the Court of Appeals makes no mention of Strunk. Unquestionally, the Strunk case, which is analagous in all respects to the instant case, must be controlling. The facts before the U.S. Supreme Court dealt with a 10 month delay prior to the defendant being brought to trial. Upon review, the Court of Appeals found this period of time to constitute a denial of the petitioner's right to a speedy trial. Having thus judicially determined that his constitutional right to a speedy trial had occurred, the Court of Appeals sought to fashion a remedy other than dismissal as mandated by *Barker* v *Wingo*. Again, it should be noted that the Court of Appeals in the instant case made the precise same judicial determination. In the *Strunk* case, the Court of Appeals attempted to modify the sentence that had been handed down, by making it shorter. The United States Supreme Court, with Chief Justice Burger speaking for a unanimous court, reversed the judgment of conviction

and ordered the Court of Appeals to direct the District Court to set aside its judgment, vacate the sentence and dismiss the indictment.

In light of *Strunk*, it is difficult to fathom how the Court of Appeals in the instant case could ignore completely the obvious applicability of that case. There is no authority for the Court of Appeals to permit the prosecution an additional 60 days or then dismiss the information and charges. Such a ruling by the Court of Appeals violates not only the letter of the law, but the spirit as well. The language from *Strunk* cited herein previously sets forth with definitiveness and finality what must be the only possible remedy when denial of a speedy trial has taken place. The Court of Appeals here, as in *Strunk*, sought to grant less drastic relief than dismissal. The United States Supreme Court, with unanimity, has spoken to this issue, and their position is clear; dismissal is the remedy, not administering a lesser sentence or granting an additional 60 days to try a person or then face dismissal.

What is before this Honorable Body is the classic case of an Appeals Court attempting to circumvent a well established principle, by carving out an exception thereto. There is no rationale for providing an additional 60 day period in which to try Atkins and then requiring a dismissal should the prosecution fail to go forth. It is impossible for the Court of Appeals to hold, as they did, that Atkins had been deprived of his right to a speedy trial and then conclude that in spite of this constitutional denial, another 60 days would not hurt. If such a holding were permitted to stand, it would be an anomaly in the law, with the Sixth Circuit Court of Appeals standing in defiance of the U.S. Supreme Court.

CONCLUSION

For the reasons contained herein, Petitioner, Aaron Atkins, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit or that the alternative, that the United States Supreme Court issue a peremptory order reversing the Court of Appeals and reinstating the District Court's Judgment as being the law of the case.

Respectfully submitted,

BELL AND HUDSON, P.C.

By: Edward F. Bell (10652)
Attorney for Petitioner, Aaron Atkins
840 Buhl Building
Detroit, Michigan 48226
313-962-2240

Dated: April 20, 1981

APPENDIX "A"

OPINION

(United States Court of Appeals
for the Sixth Circuit)

(Decided and Filed March 2, 1981)

Aaron Clinton Atkins, Petitioner-Appellee, v. People of the State of Michigan (William L. Cahalan, Wayne County Prosecuting Attorney and William Lucas, Wayne County Sheriff), Respondent-Appellant.

On Appeal from the United States District Court for the Eastern District of Michigan.

Before: Merritt and Brown, Circuit Judges; Phillips, Senior Circuit Judge.

Merritt, Circuit Judge. The state of Michigan appeals the District Court's grant of Atkins' petition for a writ of habeas corpus dismissing his state-court murder indictment on grounds that the state violated his sixth amendment right to a speedy trial and violated the fourteenth amendment in denying him bail. In January 1979 Atkins was arrested on the charge of first degree murder. He was released on bond by a judge of the Recorders Court in Detroit but later was remanded to jail without bond by an examining magistrate. Judge Evelyn Cooper, the trial judge, on February 6, 1979, reinstated the bond originally set, stating that neither she nor the examining magistrate had jurisdiction to disturb the bond. The state immediately applied for emergency leave to appeal this decision. On February 9, in a peremptory order, the state Court of Appeals cancelled the bond and

remanded Atkins to jail without a statement of reasons. Atkins' application to appeal this ruling to the Michigan Supreme Court was denied, and he returned to jail to await trial.

The parties filed several pretrial motions, including one by a co-defendant for suppression of evidence and one by the state, brought on the date set for trial (April 5, 1979), requesting a pretrial ruling on the admissibility of evidence. The trial was postponed. On May 14 the trial court ruled against the state on the suppression motion and the prosecution's evidentiary motion and set a trial date for May 30. The prosecution again perfected an emergency appeal and moved for a stay of proceedings on May 18. The Michigan Court of Appeals agreed to hear the appeal in an expidited fashion. Oral argument was held in October 1979, when the court first returned to session, but no decision was rendered until April 16, 1980, when the trial judge's ruling was affirmed in part and reversed in part. The state's application to appeal was denied by the state Supreme Court.

Meanwhile, in August 1979, when the case was pending before the state Court of Appeals, Atkins moved the trial court to dismiss the action because his right to a speedy trial had been denied, or in the alternative to release him on bail pending trial. The court denied the morion to dismiss, but, finding that circumstances had changed since the state Court of Appeals cancelled bond in February, it ordered his release on a $50,000 bond. This was appealed by the state in an emergency fashion, and on September 12, 1979, the Court of Appeals again cancelled the bond and remanded Atkins to jail. Its decision stated simply,

> It is . . . ordered that the order of the trial judge setting bond be, and is hereby set aside and the

> bond cancelled. Defendant is ordered remanded to the custody on the Wayne County Sheriff, pursuant to this court's order of February 9, 1979.

Atkins' request to appeal was denied by the state Supreme Court. He then filed a petition for writ of habeas corpus under 28 U.S.C. § 2254, on November 19, 1979, requesting that the district court order either that the case be dismissed or that trial commence immediately or that the bond set by the trial court be reinstated. On April 15, 1980, the district court issued an opinion granting the writ and ordering the dismissal of the case against petitioner and his release from custody. The state appealed to this court. We affirm in part and reverse in part.

I.

A.

We consider first whether the speedy trial claim may be entertained prior to a trial on the indictment brought by the state against Atkins.[1] A body of case law has developed holding that although § 2241 establishes jurisdiction in the federal courts to consider pretrial habeas corpus petitions, the courts should abstain from the exercise of that jurisdiction if the issues raised in the

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[1] Atkins' petition under § 2254 was improper, because that section applies only in post-trial situations, affording relief to a petitioner "in custody pursuant to the judgment of a State court." 28 U.S.C. § 2254(a). Pretrial petitions such as Atkins' are properly brought under § 2241, which applies to persons in custody regardless of whether final judgment has been rendered and regardless of the present status of the case pending against him. For a discussion of the distinction between post-trial habeas corpus relief under § 2254 and pretrial under § 2241, see Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 503-04 (1973) (Rehnquest, J. dissenting), and Moore v. DeYoung, 515 F.2d 437, 441-42 (3d Cir. 1975).

petition may be resolved either by trial on the merits in the state courts or by other state procedures available to the petitioner. *See, e.g., Ex parte Royall*, 117 U.S. 241 (1886); *Fay* v. *Noia*, 372 U.S. 391, 417-20 (1963); *Braden, supra; Moore* v. *DeYoung, supra; Brown* v. *Estelle*, 530 F.2d 1280 (5th Cir. 1976); *United States ex rel. Scranton* v. *New York*, 532 F.2d 292 (2d Cir. 1976). Abstention from the exercise of the habeas corpus jurisdiction is justified by the doctrine of comity, a recognition of the concurrent jurisdiction created by our federal system of government in the separate state and national sovereignties. Intrusion into state proceedings already underway is warranted only in extraordinary circumstances. Thus the doctrine of exhaustion of state remedies has developed to protect the state court's opportunity to confront initially and resolve constitutional issues arising within their jurisdictions and to limit federal judicial interference in state adjudicatory processes. This argument is especially forceful in a situation involving a speedy trial claim, because the drastic nature of the relief usually granted — dismissal of the case, *Strunk* v. *United States*, 412 U.S. 434 (1973) — could not be more disruptive of pending state actions.

The general argument against consideration of speedy trial habeas corpus petitions prior to exhaustion of state remedies is closely related to the doctrine that prevents appeal of adverse rulings on speedy trial motions. *United States* v. *MacDonald*, 435 U.S. 850 (1978). Although applied in the context of direct appeal from an order by a district court, much of the reasoning in *MacDonald* is relevant in that or pretrial habeas corpus as well. Among the reasons offered in *MacDonald* against pretrial appeal are that the claimed violation may be remedied by decision on the merits so that the right is not irreparably lost if review is postponed until final judgment is

rendered on the merits; and that an important factor developed in *Baker* v. *Wingo*, 407 U.S. 514 (1972), to determine whether the right to a speedy trial has been violated — a degree of prejudice suffered by the defense — cannot be adequately ascertained until after the trial has been completed. 435 U.S. at 856-61. These arguments are relevant in the context of collateral attacks as well as direct appeals and militate against a premature grant of habeas corpus relief.

These considerations, however, do not automatically resolve the question. We must distinguish between federal court orders dismissing state court cases on speedy trial grounds and federal orders requiring a prompt state trial. On occasion federal courts have, prior to trial, issued writs of habeas corpus ordering a prompt trial. The leading case on this point is *Braden* v *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), in which charges were pending in Kentucky against the petitioner, who was incarcerated in Alabama. Although Kentucky lodged a detainer against him, the state refused to attempt to effect his return in the near future and to grant him a trial as he had repeatedly requested. After it became evident that the state court would do nothing, the petitioner applied for habeas corpus relief, requesting that Kentucky be ordered to secure his presence for trial within sixty days or dismiss the indictment. The Supreme Court held that the application could be entertained despite the fact that it was brought prior to trial. It acknowledged that the petitioner could "assert a speedy trial defense when, and if, he is finally brought to trial." 410 U.S. at 489. But the Court continued,

> Petitioner does not, however, seek at this time to litigate a federal defense to a criminal charge, but

> only to demand enforcement of [Kentucky's] affirmative constitutional obligation to bring him promptly to trial. Smith v. Hooey, 393 U.S. 374 (1969). He has made repeated demands for trial to the courts of Kentucky, offering those courts an opportunity to consider on the merits his constitutional claim of the *present* denial of a speedy trial. Under these circumstances it is clear that he has exhausted all available state court remedies for consideration of that constitutional claim, even though Kentucky has not yet brought him to trial.

Id. at 489-90 (emphasis in original).

Thus the speedy trial clause protects two related but distinct interests: the enforcement of the state's duty to provide a prompt trial and the protection of defendants from the prejudice that arises from a state's failure to carry out that duty. As noted by the Fifth Circuit in *Brown* v. *Estelle, supra*, "[t]his distinction apparently turns upon the type of relief sought: an attempt to dismiss an indictment or otherwise prevent a prosecution" protects the defendant from prejudice and is normally not attainable by way of pretrial habeas corpus; but an attempt to force the state to go to trial may be made prior to trial, although state remedies must still be exhausted. 530 F.2d at 1283. When enforcing the state's duty, then, the exhaustion requirement does not necessitate a trial on the merits, as it usually does when a petitioner is claiming that his ability to defend at trial has been prejudiced. To require a petitioner to await completion of a trial before he may challenge the state's refusal to grant him one would be incoherent. The exhaustion requirement, therefore, is satisfied when the petitioner has availed himself fully of the state

machinery in attempting to have the state commence trial on the charges pending against him. As noted by the Supreme Court in *Braden*, this reformulation of the exhaustion requirement does not violate the underlying policies of federalism, for the state has the initial opportunity to consider the constitutional claim, and the relief requested will not "abort a state proceeding or . . .disrupt the orderly functioning of state judicial processes." 410 U.S. at 491. In this circumstance the concerns underlying *MacDonald's* disapproval of pretrial appeal of speedy trial motions are reduced as well. An attempt to enforce the state's duty to try petitioner promptly is sufficiently independent of the merits of the action that it may be considered separately; and the factor in *Barker* v. *Wingo, supra*, that is difficult to ascertain prior to trial — *i.e.* whether petitioner's defense has been prejudiced by the delay — assumes less significance.

With these considerations in mind, we ex mine Atkins' petition. The district court treated the petition as requesting dismissal and, without consideration of the exhaustion question, proceeded to an analysis in light of the *Barker* criteria. Finding that the delay was unreasonable and prejudicial to Atkins, the court granted a dismissal. The court erred in so doing. This disposition of the speedy trial claim runs afoul of the exhaustion requirement and the underlying concerns of federalism. Because Atkins has not yet been tried, the *Barker* prejudice criterion is indeterminate at this point, despite the district court's attempts to apply it, and available state avenues in which he can raise the claim that his speedy trial right has been violated have not been exhausted. In addition, no special circumstances

permitting pretrial habeas corpus consideration are present in this case. *Moore* v. *DeYoung, supra*, 515 F.2d at 442-43; *Frisbie* v. *Collins*, 342 U.S. 519 (1952).

This conclusion does not resolve the speedy trial issue, however. Atkins has presented alternative requests for relief, including that the state be ordered to grant him his right to a prompt trial. Under *Braden* this request may be considered by pretrial habeas corpus, provided the state courts have had an opportunity to resolve the issue. We find that Atkins diligently presented this constitutional claim in state court prior to his petition for habeas corpus and that, therefore, he exhausted his available state remedies. In August 1979 he moved the trial court to dismiss the indictment on speedy trial grounds or to release him on bail pending trial. At that point the trial court, of course, had not the authority to order the prompt trial of Atkins in order to enforce the state's constitutional duty to do so, because at that time the state Court of Appeals was considering the prosecution's interlocutory appeal and could not be ordered by a trial court to speed up its process. When the Court of Appeals, however, considered the prosecution's appeal of the trial court's release of Atkins on bail and when the Michigan Supreme Court decided whether to permit Atkins to appeal the revocation of bail, both courts had the opportunity to consider and were confronted by the specific argument, *Picard* v. *Connor*, 404 U.S. 270 (1971), that the state was violating its duty to grant Atkins a prompt trial. After the state Supreme Court denied Atkins leave to appeal, no state avenue remained open to him to press his claim. Application for a writ of habeas corpus in this situation to consider whether the state violated its duty is proper. *Braden; Brown* v. *Estelle, supra*.

B.

Turning to the merits of this speedy trial claim for a prompt trial, we focus primarily on the question of the reasonableness of the delay, that is, whether the state is justified in having failed to commence trial against Atkins promptly. The length of time involved here — fifteen months from arrest to decision by the state Court of Appeals on the interlocutory order — unquestionably is sufficient to trigger a speedy trial claim. The great bulk of this period was spent in the resolution of the interlocutory appeal resulting from the prosecution's pretrial motion filed on the day trial was originally to commence. Eleven months passed from the time the prosecution appealed the trial court's adverse decision on its motion until the state Court of Appeals handed down a decision, despite the fact that the appeal was ostensibly handled in an expedited fashion. The prosecution, of course, has the authority, and indeed the obligation, to press appeals in good faith, and we do not find that its decision to appeal arose from improper motives. The eleven month pretrial delay following the appeal, however, is unexplained. In a similar situation both the Michigan Supreme Court and the federal District Court for the Western District of Michigan have expressed the view that a violation of the right to a speedy trial can arise from the consumption of an excessive amount of time by the appeals court considering an interlocutory appeal. *People* v. *Chism*, 390 Mich. 104, 113, 211 N.W.2d 193 (1973); *Chism* v. *Koehler*, 392 F. Supp. 659 (W.D. Mich. 1975), *aff'd*, 527 F.2d 612 (6th Cir.), *cert. denied*, 425 U.S. 944 (1976). In the present case we find that the time spent on appeal, when added

to the previous four month delay, resulted in a violation of the duty of the state to bring Atkins promptly to trial.

At oral argument, the state has demonstrated a willingness to commence trial of this action, and given that the appeal of the interlocutory matter has since been completed, there seems to be no threat of further delay. Because a violation of the duty to try Atkins promptly has been found, however, we are constrained to order that his trial commence within sixty days, to guarantee that no further infringement of his right to a trial occur. If trial has not begun by the end of that period, the case against Atkins must be dismissed. This conclusion does not necessarily establish a violation of Atkins' right to a speedy trial warranting dismissal of the case against him. Only one element of that claim — the element of unreasonable delay — has been established. Another crucial element in such a claim, as discussed above, is the degree of prejudice suffered by a defendant, an element that can be accurately ascertained only after completion of the trial.

II.

We next must consider whether the revocation of bail by the state Court of Appeals on two occasions violated Atkins' constitutional rights. Atkins and the court below have focused upon the fourteenth amendment, arguing that the Court of Appeals behaved arbitrarily and capriciously in the manner in which it revoked bail, in violation of Atkins' right to due process of law. Thus although this isue concerns the right to liberty on bail pending trial, this is not an eighth amendment case. That amendment's statement that "[e]xcessive bail shall

not be required" has never been interpreted to require that all persons awaiting trial be released on bail. The states have the authority to determine that certain arestees are so dangerous to the community — because of either the nature of the crime with which they are charged or their propensity to flee before trial — that they may be denied bail and incarcerated. The crucial considerations in the present case are that "inherent in our American concept of liberty" in the general existence of the right to bail, *Mastrian* v. *Hedman*, 326 F.2d 708, 710 (8th Cir. 1964), and that if bail is denied, the denial must not violate the procedural standards developed from the due process clause *Id.* at 711; *United States ex rel. Shakur* v. *Comm'r of Corrections*, 303 F. Supp. 303 (S.D.N.Y.), *aff'd*, 418 F.2d 243 (2d Cir. 1969), *cert. denied*, 397 U.S. 999 (1970). Atkins' liberty interest is sufficiently urgent that as a matter of due process it cannot be denied without the application of a reasonably clear legal standard and the statement of a rational basis for the denial.

A.

Before we may consider this issue, we must once again determine whether a pretrial habeas corpus petition is a proper vehicle to raise the claim. The protection against unreasonable bail pending trial has been found by the federal courts to be one of the few rights, along with the right to be free of double jeopardy, *Abney* v. *United States*, 431 U.S. 651 (1977); *Gully* v. *Kunzman*, 592 F.2d 283 (6th Cir.), *cert. denied*, 442 U.S. 924 (1979), whose vindication may be asserted prior to trial, either by direct appeal of an adverse interlocutory order or by a petition for habeas corpus. *Stack* v. *Boyle*, 342 U.S. 1

(1951); *United States* v. *MacDonald*, 435 U.S. 850, 853-61 (1978). If asserted by way of habeas corpus, however, the petitioner must demonstrate that state remedies have been exhausted. Then, as in the case of federal review of the state's duty to afford a prompt trial under the speedy trial clause, consideration of the right to bail pending trial avoids the concerns militating against piecemeal appeal or federal interference in state criminal proceedings. The issue of whether the right to bail has been denied is collateral to and independent of the merits of the case pending against the detainee, and it is a right that, if not asserted immediately at the time is infringed, is irremediably lost. *Stack* v. *Boyle, supra*, at 12 (Jackson, J., concurring). *Cf. Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949) (presenting criteria for "collateral order" exception to general rule prohibiting piecemeal appeal). In addition, as in *Braden, supra*, if state courts have been offered an opportunity to confront the issue, then a petition to the federal courts prior to trial does not violate the values of federalism.

The present case in a narrow sense involves questions of due process, which usually may not be considered by way of pretrial habeas corpus. *Gully* v. *Kunzman, supra*, at 287-88. The due process questions, however, exist here only in connection with the right to bail pending trial — a right that must be defended immediately if it is to be protected at all. Accordingly, we may consider this portion of Atkins' petition at this time, provided he has exhausted available state remedies. *United States ex rel. Goodman* v. *Kehl*, 456 F.2d 863 (2d Cir. 1972); *United States ex rel. Shakur* v. *Comm'r of Corrections*, 303 F. Supp. 299 (S.D.N.Y. 1969); *United States ex rel. Covington* v. *Coparo*, 297 F. Supp. 203 (S.D.N.Y. 1969).

Atkins has claimed in the state courts that his right to bail pending trial was violated. On two occasions the state Court of Appeals cancelled, without a statement of reasons, the bond set by the trial court, and on both occasions Atkins sought leave to appeal to the Michigan Supreme Court, arguing that the Court of Appeals violated the Michigan Court Rules and acted arbitrarily by revoking bond in this manner. When leave was denied no avenue remained in the state court system. Atkins only recourse was to the federal courts by way of a petition for habeas corpus.

B.

We turn now to the merits of the bail issue. The Michigan Constitution and statutes provided that before conviction all persons shall be permitted release on bail, except in cases involving murder or treason "when the proof is evident or the presumption great." Mich. Const. Art. I, § 15; Mich. Stat. Ann. § 765.5. The Michigan Court Rules, promulgated by the state Supreme Court, provide that if a lower court's bail decision is reviewed, it "remains in effect and may not be vacated, modified, or reversed except on a finding of an abuse of judicial discretion." Rule 790.7(d). In Atkins' case the Court of Appeals twice cancelled the bond set by the trial court, giving reasons for the action on neither occasion. The parties and the court below have debated the possible reasons for the Court of Appeals' decisions: whether the presumption of guilt was great enough to warrant a refusal to set bond, whether jurisdiction reposed in the trial court to reinstate the bond revoked by the examining magistrate in February 1979, or whether the Court of Appeals might have found an abuse of discretion on the part of the trial court.

Such guesswork is improper. The lack of reasoning, the total silence of the Court of Appeals appears to constitute a violation of the Michigan Court Rules. *People* v. *Spicer*, 402 Mich. 406, 263 N.W.2d 256 (1978). It also constitutes an arbitrary denial of Atkins' fundamental interest in liberty pending trial and therefore violated his right to due process of law. Bail may not be denied arbitrarily. *Mastrian* v. *Hedman*, 326 F.2d 708 (8th Cir. 1964). Here bond was twice cancelled in cursory orders supplying no reasons. This renders any meaningful review impossible and violates the basic norms of judicial decisionmaking, which require that decisions generally be reached through reasoned argument, not by fiat. The fourteenth amendment does not permit such an important interest as that of liberty pending trial to be curtailed in so arbitrary a fashion. Reasons very well might exist to deny Atkins his freedom on bail while he awaits trial. We do not address this question. We state only that if his liberty is to be denied, it must be done pursuant to an adjudicatory procedure that does not violate the standards for due process established by the fourteenth amendment.

III.

Accordingly, the district court's dismissal of the case against Atkins is reversed, and the charges are reinstated. The trial, however, must commence within sixty days, or the case shall be dismissed. The order of Judg Evelyn Cooper releasing Atkins from custody on a $50,000 bond is reinstated, and Atkins shall remain at liberty according to the conditions thereof until trial commences, unless that order is vacated or modified in a manner consonant with due process.

80-1892

No. 80-1341

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AARON CLINTON ATKINS,
Petitioner,

v

PEOPLE OF THE STATE OF MICHIGAN
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX

BELL AND HUDSON, P.C.

By: Edward F. Bell (P10652)
Attorney for Petitioner,
Aaron Atkins
840 Buhl Building
Detroit, Michigan 48226
313-962-2240

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
(313) 962-8745

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MEMORANDUM OPINION AND ORDER

(United States District Court
Eastern District of Michigan
Southern Division)

(Aaron Clinton Atkins, Petitioner, vs People of the State of Michigan (William L. Cahalan, Wayne County Prosecuting Attorney and William Lucas, Wayne County Sheriff) Respondent). Civil No. 79-74405

"We do well to bear in mind the extraordinary prestige of the Great Writ, habeas corpus ad subjiciendum, in Anglo-American jurisprudence: 'the most celebrated writ in the English law.'

3 Blackstone Commentaries 129. It is 'a writ antecedent to statute, and throwing its root deep into the genius of our common law . . . It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I.' *Secretary of State for Home Affairs v. O'Brien* [1923] AC 603, 609 (HL). Received into our own law in the colonial period, given explicit recognition in the Federal Constitution, Art 1, § 9, cl 2, incorporated in the first grant of federal court jurisdiction, Act of September 24, 1789, c 20, § 14, 1 Stat 81, 82, habeas corpus was early confirmed by Chief Justice John Marshall to be a "great constitutional privilege." *Ex parte Bollman and Swartwout* (US) 4 Cranch 75, 95, 2 L ed 554, 561. Only two Terms ago this Court had occasion to reaffirm the high place of the writ in our jurisprudence: "We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired,' *Bowen v. Johnston*, 306 US 19, 26, 83 L ed 455, 461, 59 S Ct 442 (1939), and unsuspended, save only in the cases specified in our Constitution.' *Smith v. Bennett*, 365 US 708, 713, 6 L ed 2d 39, 43, 81 S Ct 895.

These are not extravagant expressions. Behind them may be discerned the unceasing contest between personal liberty and government oppression. It is no accident that habeas corpus has time and again played a central role in

> national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today." Mr. Justice Brennan for the Court in *Fay v. Noia*, 372 US 391, 9 LEd 2d 837, 83 S. Ct 822, at 372 US 400.

On January 22, 1979, Aaron Clinton Atkins voluntarily presented himself, with his attorney, for arraignment on a charge of first degree murder which had been brought against him by the People of the State of Michigan. With the exception of three brief periods, totaling 24 days, during which he was at liberty on bail ordered on three occasions by trial court judges who were immediately summarily reversed by the Michigan Court of Appeals, Aaron Atkins has been awaiting trial in the Wayne County Jail ever since. There is no date set for his trial. This opinion is being written fifteen months after his first of four voluntary surrenders since the charge in this matter was brought.

A magistrate of the Recorder's Court of the City of Detroit arraigned Atkins on January 22, 1979, on the charge of the murder of one Girard Tolbert, who had been found by the Wayne County Medical Examiner to have died of a drug overdose in 1974. The Magistrate remanded Atkins without bond to the Wayne County Jail. The following day Recorder's Court Judge Dalton Roberson set a $50,000.00 two surety bond, on motion of Atkins' attorney. Although the People allege in their brief that the order was contrary to Michigan law, no appeal was taken.

The Michigan Constitution, Article 1, § 15 provides:

> ". . . All persons shall, before conviction be bailable by sufficient sureties, except for murder

> and treason when the proof is evident or the presumption great."

Michigan Compiled Laws, § 765.5 provides:

> "No person charged with treason or murder shall be admitted to bail if the proof of his guilt is evident or the presumption great."

The Michigan Court Rule 790, promulgated by the Supreme Court of Michigan, governs pretrial release. It provides, at 790.1, that, "Except for one charged with murder or treason when the proof is evident or the presumption great, a person charged with a crime is entitled:

(1) to release on his own recognizance,

(2) conditional release, or

(3) release on money bail (surety, 10 percent, or cash)."

The circumstances to be considered by a court in determinations of pretrial release are enumerated and, at 790.5, the rule further provides:

> "Unless the defendant is released on his own recognizance, the court must state the reason for its decision on the record. The Court's statement need not include a finding on each of the enumerated factors."

At 790.7, review of such orders is provided, as follows:

> (b) A bail decision by a judge of a court of general jurisdiction may be reviewed by motion filed in the Court of Appeals.

* * *

> (d) The lower court's order setting bail remains in effect and may not be vacated, modified, or reversed except on a finding of an abuse of judicial discretion.

Mr. Atkins' Preliminary Examination, for which he again voluntarily presented himself, was held by Judge Clarice Jobes on January 31, 1979. At that time, he was bound over and again remanded to the Wayne County Jail, without bond. On February 6, 1979, the trial judge to whom the case was assigned, Judge Evelyn Cooper, reinstated the bond previously set by Judge Roberson, and that same day the Wayne County Prosecutor, on behalf of the People of Michigan, filed an emergency application for leave to appeal in the Michigan Court of Appeals. Within three days, on February 9, 1979, and without benefit of a transcript of the Recorder's Court hearing, the Michigan Court of Appeals issued a summary order granting immediate leave to appeal, and ruling:

> "It is further ordered that the bond set by the trial court in this cause be, and the same is hereby, canceled [sic] and the defendant is hereby ordered remanded to the Wayne County Jail."

No findings of either an abuse of discretion or of any other matters were made. The same Court's 1978 decision, in *People v. Edmund*, 81 Mich App 743, which had elucidated the above-quoted General Court Rule 790, had stated that the standard of review of a pretrial release or bail decision must be that of abuse of judicial discretion by the trial court. Moreover, in *Edmund*, that same court had held that a party seeking review of a bail decision under the pretrial release court rule must file with the Court of Appeals a certified copy of the

transcript of the pretrial release hearing. Neither was done in this case.

Aaron Atkins voluntarily surrendered himself again after this bond cancellation, a trial date was set for April 5, 1979, and a series of pretrial evidentiary motions were heard in the interim. On the date of trial, when jury selection was to commence, the Wayne County Prosecutor filed and served a written motion requesting that the court rule upon the admissibility of the "similar acts" testimony of a previously endorsed witness, Levi Williams. Despite the objections of defense counsel that the motion cutoff date had passed, that the requisite four day notice had not been given and that the motion raised questions which could be resolved in the course of the trial, the trial judge, Judge Evelyn Cooper, adjourned the trial to take the motion under advisement. On May 14, 1979, Judge Cooper denied the prosecution motion and set a new trial date of May 30, 1979.

However, on May 18, 1979, the People filed an emergency application for leave to appeal Judge Cooper's adverse ruling; and on May 24, 1979, the Court of Appeals granted the prosecution motion for immediate consideration of the interlocutory appeal, granted a Stay of Trial pending appeal, and halved the briefing schedule. As with the first order, no grounds for the orders were stated. The Court of Appeals heard oral arguments on the appeal in October, 1979. The trial remains stayed, to this date, and no decision has yet been made by the Court of Appeals on the prosecution's emergency appeal.

On August 30, 1979, Judge Cooper heard arguments on Mr. Atkins' motion to dismiss for denial of his right to a speedy trial. She denied that request, but made findings on the record that circumstances had changed since the

Court of Appeals' cancellation of bond of February 9, 1979, and for stated reasons including Atkins' history of three voluntary surrenders during pendency of the charges, and that he had been incarcerated for more than six months, ordered a $50,000 ten percent bond.

Michigan General Court Rule 789.2 relating to Speedy Trial in criminal cases, provides in relevant part that:

> "In felony cases where the defendant has been incarcerated for a period of six months or more to answer for the same crime or a crime based on the same conduct — the defendant shall be released on his own recognizance, except that in computing the — 6 month periods, the following periods shall be excluded:"

The prosecution's argument at that time and its subsequent appeal was that the following *exclusions* from the six month limitation of 789.2 were applicable to Atkins on August 30:

> (1) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on mental competency and the period to which he is not competent to stand trial, *hearings on pretrial motions*, interlocutory appeals, and trial of other charges.
>
> * * *
>
> (3) The period of delay resulting from a continuance granted to the request of the prosecuting attorney, if
>
> > (a) the continuance is granted because of the *unavailability of evidence material to the state's case*, when the prosecuting attorney

has exercised due diligence to obtain such evidence and there are *reasonable grounds to believe that such evidence will be available at the later date;*

(b) the continuance is granted for good cause shown on the record to allow the prosecuting attorney additional time to prepare the state's case.

* * *

(5) *Other periods of delay for good cause within the discretion of the court*, however, docket congestion is not good cause for delay. (Emphasis added in prosecution briefs.)

Mr. Atkins was free on the $50,000 ten percent surety bond set by Judge Coooper from August 30, 1979, until September 12, 1979, when the Court of Appeals again issued a summary order cancelling bond and remanding him to the Wayne County Jail. He again surrendered voluntarily. The Court of Appeals again made its decision without a transcript and made no findings as to an abuse of discretion by the Trial Judge, or any other pertinent factors. It merely granted immediate consideration, granted emergency application for leave to appeal, and stated:

> "It is further ordered that the order of the trial judge setting bond be and is hereby set aside and the bond cancelled. Defendant is ordered remanded to the custody of the Wayne County Sheriff, pursuant to this Court's order of February 9, 1979."

After his fourth voluntary surrender Mr. Atkins filed an emergency application for leave to appeal to the

Supreme Court of Michigan, which was denied on November 2, 1979, with the following statement:

> "The emergency applicaton for leave to appeal is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court."

Mr. Atkins has never asked for an adjournment, since his first surrender and arraignment.

In October, 1979, before the Michigan Court of Appeals, the parties orally argued the merits of the prosecution's appeal for a declaration of the admissibility against Atkins at trial of the "similar acts" testimony of a Levi Williams. The Court's recording of those arguments sheds considerable light upon Mr. Atkins' eligibility for bond under the Michigan Constitution, statute, and Rules declaring all persons bailable before conviction except those charged with treason and murder *"when the proof is evident or the presumption great."* The arguments reflect repeated case admissions by the prosecution that, despite five years of preparation for this charge of a 1974 murder, on the date of trial, it could not hope to convict Mr. Atkins without the "similar acts" testimony on which it insisted upon a pretrial ruling. Moreover, the "similar acts" testimony of Mr. Levi Williams which the prosecution deems necessary to its case had been given in two other prior prosecutions of Atkins in the Wayne County Circuit Court, and had been disbelieved to the extent that it resulted in dismissals of the charges against Atkins on both occasions. In 1977 Judge Theodore Bohn, after hearing the testimony of Levi Williams on one of the acts now offered, directed the jury to find Atkins not guilty of the charge lodged. On the other act to which Levi Williams has testified and on which the prosecution again offers his testimony, then Wayne County Circuit

Court Judge Blair Moody dismissed the charges for lack of probable cause. The purpose of the prosecution's insistence upon the "similar acts" testimony of Levi Williams in this matter, this court finds, is purely to create improper prejudice to Mr. Atkins, in the absence of sufficiently proper evidence to offer against him. The government's two other material witnesses, Mr. Moore and Ms. Marshall, have been in protective custody since the inception of this matter, are acknowledged and apparently notorious drug addicts of small credibility, are indicated by deposition testimony to have been continued in their addictive condition throughout custody, and are suggested by Atkins' counsel to have reached a condition of complete moral compromise and incredibility.

Finally, relevant to the bond status of Atkins as a person charged of murder "where the proof is evident," the prosecutor made the following argument to the Court of Appeals in its plea for admission of the "similar acts":

> "I believe we can show guilt beyond a reasonable doubt based on Mr. Moore's testimony. I do not believe that the jury will find guilt beyond a reasonable doubt because of the actions of juries based upon my experience of proceedings in this. It is the prosecution's position that we can prove beyond a reasonable doubt through Mr. Moore's testimony, that crime was committed and that Mr. Atkins and Mr. Wiggins did it, but we do not believe that the jury, in weighing this testimony, will find guilt beyond a reasonable doubt."

At another point in that argument, the prosecution stated:

> "We're talking about the crime of premeditated murder here and if we do not have any other

> evidence beyond Mr. Moore's testimony to who, that this, in fact was a death by criminal means and that Mr. Atkins and Mr. Wiggins were the perpetrators rather than the victim himself had an accidental overdose, I think this man will be acquitted also.

It is, therefore, acknowledged by the People of the State of Michigan that Mr. Atkins is not a murder defendant against whom "the proof is evident or the presumption great."

Aaron Atkins filed his petition for a Writ of Habeas Corpus in this court, pursuant to 28 USC § 2254, on November 14, 1979, complaining of violation by Respondents of his rights as guaranteed by the constitution of the United States to a speedy trial and to due process of law. Atkins petitions this court to dismiss the charge pending against him by the People of the State of Michigan.

On November 26, 1979, this Court entered an Order of Reference to Magistrate Paul Komives for hearing and recommendation. Notice of referral was served on Atkins' attorney, Edward F. Bell, as well as upon the Prosecutor of the County of Wayne and the Special Prosecutor, and the Attorney General of the State of Michigan.

After examining the Petition, as required by Rule 5, Rules governing § 2254, Magistrate Komives by order accorded Respondents sixty (60) days in which to respond to Mr. Atkins' petition. On the sixty-first (61st) day, February 21, 1980, the Attorney General, by Assistant Attorney General C. Michael Mathis, entered an appearance and filed a Motion for Enlargement of Time in which to respond. Four days later, on February 26, 1980, Atkins' counsel answered that motion stating

grounds adequate for an extension of time had not been demonstrated. This court denied the motion and entered an Order to the People to Show Cause before the court why the Writ and requested relief should not be granted, on April 7, 1980.

On February 28, 1980, prior to the entry of the Order to Show Cause, Magistrate Komives ordered the clerk of the court to serve a copy of Mr. Atkins' petition upon William Lucas, Sheriff, and William Cahalan, the Wayne County Prosecutor. The Magistrate further ordered these parties to file a responsive pleading to the petition on or before March 28, 1980. Service of the petition was effectuated on March 5, 1980, but the Wayne County officials who actually held Mr. Atkins in custody were not served with the Order to Show Cause. They were, however, orally notified of the April 7, 1980 hearing by the court. The answer and brief in support was filed by the Wayne County Prosecutor on March 27, 1980.

The Assistant Prosecuting Attorney for Wayne County, C. Michael Mathis, Assistant Attorney General of the State of Michigan, and Edward F. Bell, attorney for the petitioner, appeared before the court on April 7, 1980 for the Show Cause hearing. Mr. Bell orally reiterated the procedural history of petitioner's present circumstances. He addressed himself, as well, to the merits of Mr. Atkins' petition for a writ of habeas corpus and for dismissal of the murder charge for denial of his federal constitutional rights to a speedy trial and to the due process of law, in bond denials.

The Assistant Wayne County Prosecutor appearing on behalf of the Sheriff, the custodian of Petition [*sic*] Atkins, and on behalf of the County Prosecutor, was unprepared to argue on the merits, and her responsive argument was adjourned to April 14, 1980.

The Assistant Attorney General, Mr. Mathis, who had on February 21, 1980 filed an appearance and requested an extension of time in which to file responses on behalf of the People, stated that his personal function is to represent only the Michigan Department of Corrections, and inasmuch as Mr. Atkins is now in the Wayne County Jail, he had no presentation to make on behalf of the People.

Arguments were concluded on April 14, 1980, with the prosecution's presentation of its argument that, although Atkins has asserted his right to a speedy trial at three levels of the state judiciary, he has not properly done so as is required for exhaustion of state remedies, because he has cited state, not federal, case law to the state courts. This court finds that argument to be factually incorrect and legally unworthy.

The Eighth Amendment to the Constitution of the United States of America mandates that "excessive bail shall not be required." In *Schilb v. Keubel*, 404 U.S. 357 (1971) the Supreme Court stated that "the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment" (404 U.S. at 365). In *Stack v. Boyle*, 342 U.S. 1 (1951) perhaps the leading Supreme Court decision on the constitutional right to bail, the court recognized that "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning" (342 U.S. at 4). The *Boyle* decision mandated that bail be set in every case in an amount no greater than necessary to assure the defendant's appearance for trial. The utilization of bail for any punitive purpose, accordingly, is impermissible.

On petition for habeas corpus, it is settled that a federal court has jurisdiction to review the denial of bail by state courts, where a constitutional violation has been alleged. See *In re Shuttlesworth*, 369 U.S. 35, (1965), a case of a civil rights demonstration leader held without bail, and *Turco v. State of Maryland*, 324 F. Supp 61 (U.S.D.C. Md.), aff'd. 444 F.2d 56, a case of a Black Panther activist held without bail: and *United States ex rel Goodman v. Kehl*, 456 F.2d 863 (CA 2, 1972), a denial of bail in a contempt matter growing out of certain riots which had occurred at the Manhattan House of Detention in 1970. The federal courts, on this writ, perceive no constitutional distinction between the requiring of excessive bail and the denial of bail altogether, in the absence of legitimate reasons. The *Goodman, supra*, court wrote:

> "Consequently, under the Eighth Amendment, where bail is fixed . . . it must not be excessive, and further, where bail is not a matter of right, the [state] court may not arbitrarily or unreasonably deny bail." *U.S. ex rel Covington v. Copaio*, 297 F.Supp 203, 206. Federal habeas corpus has been recognized as an appropriate remedial device for bringing before a federal court challenges to state bail practices before and during a criminal proceedings." 456 F.2d at 868.

In *Mastrian v. Hedman*, 326 F.2d 708, 711 (CA 8, 1964), cert denied 376 U.S. 965, the court wrote that "[a]s to . . . offense . . . for which a state has provided a right to bail it may not, any more than as to other substantive or procedural benefits under its criminal law system, engage in such administration as arbitrarily or discriminatorily to effect denial or deprivation of the right to a particular accused." Also see *United States ex rel*

Shakur v. Commissioners of Corrections, 303 F. Supp 303, S.D.N.Y. aff'd 418 F.2d 243 (CA 2, 1969), cert denied 397 U.S. 999 (1970). This Court finds the cancellations of Petitioner Atkins' bail, by the Michigan Court of Appeals, after that bail had twice been set by the trial judge, under all of the circumstances described above, constitute an arbitrary and discriminatory denial of his right to the due process of law.

The Michigan constitution, statutes, and Court Rules, all cited above, uniformly guarantee an accused the right to have reasonable pretrial bond established except when the charge is treason or murder, and the proof evident or presumption great. The Court rules provide the nine factors to be considered in establishing terms of release; provide that reasons must be given by the court when any pretrial status other than personal recognizance is ordered; and provide that a reversal of the trial judge's decision be made only after an explicit finding of an abuse of discretion. Case law requires that the finding of an abuse of discretion be based upon the review of a certified transcript.

The case against Aaron Atkins, the court finds on the basis of the prosecution's above-quoted argument to the Court of Appeals, is not one in which the proof is evident or the presumption great. It is a case, instead, in which the prosecution admits that it cannot, without the assistance of highly prejudicial evidence of small probative value, obtain a conviction. Moreover, the Court of Appeals on both February 9, 1979 and again on September 12, 1979, cancelled the bail set for petitioner by a trial judge without benefit of transcript, without a finding of any abuse of discretion, and without stated reasons of any sort. Accordingly, the denials of bail which have twice occurred herein, and which were affirmed by the Supreme Court of Michigan by its denial

of Petitioner's application for leave to appeal on November 2, 1979, are hereby found to constitute an arbitrary and discriminatory denial of Mr. Atkins' right to the due process of law.

The Supreme Court in *Klopfer v. North Carolina*, 386 U.S. 213 (1967), established that the right to a speedy trial is a fundamental one required by the due process clause of the Fourteenth Amendment to be recognized by the states. In *Barker v. Wingo*, 407 U.S. 514 (1972), the Court enumerated the four factors which are relevant to an assessment of whether that fundamental right to a speedy trial has been abridged. Those factors include (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to defendant both in terms of personal anxiety and stress and in terms of impact upon his ability to present an adequate defense. None of the four factors are either necessary or sufficient, but rather the court must consider those factors which are relevant to the particular defendant before it. *Moore v. Arizona*, 414 U.S. 25 (1973). When an abridgment of the right to speedy trial has been demonstrated, the court is required to dismiss the indictment against the accused. *Strunk v. United States*, 412 U.S. 434 (1973).

The ad hoc balancing test mandated by the *Barker* formula was adopted by Michigan in *People v. Grimmett*, 388 Mich 596 (1972), and *People v. Collins*, 388 Mich 688 (1972).

Not only does *Barker v. Wingo* contemplate that a speedy trial challenge may be raised by a petitioner prior to trial, 407 U.S. 514, 522, but *Braden v. 30th Judicial Court of Kentucky*, 410 U.S. 484, (1973), makes clear that a federal district court has jurisdiction to hear a petition for habeas relief on a speedy trial claim prior to trial on a pending criminal charge. See also *Kane v. State of Virginia*,

419 F.2d 1369 (4 Cir 1970) and *May v. State of Georgia*, 409 F.2d 203 (5 Cir 1969).

While the Respondent People of the State of Michigan rely upon *United States v. MacDonald*, 435 U.S. 850 (1978) to argue that petitioner is premature in raising denial of his right to speedy trial at this point in time, *MacDonald* is not relevant to a habeas challenge to state court proceedings. *MacDonald* holds that the defendant may not pursue an appeal from a federal district court's denial of a motion to dismiss based upon speedy trial violations prior to the trial of his cause. However, the purpose of habeas corpus differs significantly from that of an appeal, in that the Petition for a Writ represents a collateral challenge to the state court rulings which arguably violate a petitioner's constitutionally guaranteed rights. This court's consideration of the habeas petition has not caused any delay of the state proceedings.

This court has considered the four factors to which the Supreme Court has directed its attention, in the *Barker* case. The duration of delay in this case has been fifteen months, and no trial date is set. Atkins has been incarcerated throughout, except for the brief periods of freedom prior to reversal of the two bail orders of the Trial Judge. The prosecution relies upon Michigan General Court Rule 780.2(1) in arguing that periods of interlocutory appeal are to be excluded. The language of that court rule, however, is applicable to interlocutory appeals of *other charges*. Moreover, the appeal is from the denial of an eleventh hour prosecution pretrial motion which the prosecution has here acknowledged could have been handled as an evidentiary ruling during trial, and which is based upon the prosecution's further acknowledgement to the Court of Appeals that it is, with

possible available evidence, unable to obtain a conviction. The reason for delay includes approximately four months prior to the initial trial date of April 5, 1978, which were spent in pretrial motions, and which is permissible delay. However, approximately eleven months since May 18, 1979 have been consumed by the Michigan Court of Appeals' interlocutory consideration of the People's emergency appeal. This delay is impermissibly in derogation of Petitioner's right to a speedy trial. See *People v Chism*, 390 Mich 104 (1973), in which the Michigan Supreme Court considered a 14½ month interlocutory appeal initiated by the defendant. While the court confirmed that ". . . time reasonably consumed on appeal cannot be considered as in derogation of a speedy trial . . . the whole 14½ months required by the Court of Appeals to dispose of this motion is hard to justify under the cirumstances, particularly in light of that Court's abbreviating the time for filing briefs and motions . . . Consequently, it must be recognized that a part of the appeal time is indeed excessive . . . ." 390 Mich 104, 113.

In this case the People, not defendant, initiated the May 18, 1979, interlocutory appeal; and the Court of Appeals has been well aware of defendant Atkins' incarceration, having twice reversed the Trial Court's decision to grant him bail, and having inquired of the prosecution during the October oral arguments as to whether the prosecution was concerned about a speedy trial problem. Accordingly, this court finds the interlocutory appeal to have been an overlong delay, and an intrustion upon Atkins' constitutional right to a speedy trial. The delay is a particularly egregious intrusion, moreover, because it has been combined with two improper summary reversals of the trial court's pretrial bail decisions.

This Defendant, Petitioner Atkins', assertion of his right to a speedy trial began with his objection to the People's untimely and unnecessary pretrial motion on the day of his scheduled trial, April 5, 1979, and has continued unflaggingly throughout this period. Petitioner's motion to dismiss for denial of speedy trial was denied by Judge Cooper in August, 1979, and although her new bail order was reversed, her refusal to dismiss was left undisturbed by the Court of Appeals' September Order, and by the Supreme Court of Michigan's rejection of Atkins' appeal in November. Petitioner then, on November 14, 1979, brought his request for habeas corpus to this court on the basis of a speedy trial denial. Mr. Atkins has never requested an adjournment.

In *Strunk v. United States, supra*, the opinion of Chief Justice Burger noted:

> "It is true that *Barker* described dismissal of an indictment for denial of a speedy trial as an 'unsatisfactorily severe remedy.' Indeed, in practice it means that a defendant who may be guilty of a serious crime may go free, without having been tried." 407 U.S. at 522. But such severe remedies are not unique in the application of constitutional standards. In light of the policies which underlie the right to a speedy trial, dismissal must remain, as Barker noted, 'the only possible remedy.' *Ibid.*

The *Strunk* case is also pertinent to the fourth applicable factor for consideration of an arguably overlong delay: prejudice to the defendant. *Strunk*, holds, at 412 U.S. 439:

> "The speedy trial guarantee recognizes that a prolonged delay may subject the accused to an

> emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial or of receiving a sentence longer than, or consecutive to, the one he is presently serving — uncertainties that a prompt trial resolves."

This court finds Petitioner Atkins to have been prejudiced if only and at least, by the emotional stress which the *Strunk* court permits us to presume. Accordingly, for all of the reasons outlined above, this Court finds Petitioner Atkins to have been deprived of his right to a speedy trial to such an extent that the State of Michigan has denied to him the due process of law as assured by the Fourteenth Amendment of the United States Constitution.

It appears to this court that the prosecution, knowing that its evidence is insufficient to establish the guilt of Aaron Atkins beyond a reasonable doubt, has embarked upon a course of delay of the moment of truth, in derogation of the right assured by the United States Constitution to all accused persons to a speedy and public trial. Simultaneously, the prosecution and the law officers involved appear to have undertaken a campaign of vilification of Atkins, his most diligent defense counsel, and of the trial Judges of the Recorder's Court who have released Atkins on bail. The Court takes judicial notice of that campaign, inasmuch as it is a matter of public knowledge beyond dispute within this district conducted from the front pages of its leading newspaper; the evening newspaper of largest circulation in the nation.

Throughout this period Atkins, a legally innocent man, has remained incarcerated in the Wayne County Jail, in violation of all applicable state laws and court rules.

This Court will grant the Writ, and the relief requested of dismissal of the pending charge. In doing so, it refers again to the opinion of Mr. Justice Brennan in *Fay v. Noia, supra*, at 372 U.S. 440, as follows:

> "It should be unnecessary to repeat what so often has been said and what so plainly is the case: that the availability of the Great Writ of habeas corpus in the federal courts for persons in the custody of the States offends no legitimate state interest in the enforcement of criminal justice or procedure. Our decision today swings open no prison gates. Today as always few indeed is the number of state prisoners who eventually win their freedom by means of federal habeas corpus. Those few who are ultimately successful are persons whom society has grievously wronged and for whom belated liberation is little enough compensation. Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to languish in prison.
>
> * * *
>
> For such anomolies, such affronts to the conscience of a civilized society, habeas corpus is predestined by its historical role in the struggle for personal liberty to be the ultimate remedy. If the States withhold effective remedy, the federal courts have the power and the duty to provide it. Habeas corpus is one of the precious heritages of Anglo-American civilization. We do no more today than confirm its continuing efficacy."

So Ordered.

ANNA DIGGS TAYLOR
United States District Judge

Dated: April 15, 1980

JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

(Aaron Clinton Atkins, Petitioner, vs People of the State of Michigan (William L. Cahalan, Wayne County Prosecuting Attorney and William Lucas, Wayne County Sheriff) Respondent.) Civil No. 79-74405

This Court having reviewed the Briefs, Exhibits, files and records, and having heard oral arguments submitted in the above captioned matter, and being fully advised in the premises, and for the reasons stated in its Memorandum Opinion of this date:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Petition for Writ of Habeas Corpus be and the same is hereby granted and that Petitioner is ordered discharged forthwith from confinement in the Wayne County Jail,

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the case pending against the Petitioner in Recorder's Court for the City of Detroit, (Case Number 79-00440) for the alleged murder of Girard Lee Tolbert be dismissed forthwith.

ANNA DIGGS TAYLOR
United States District Judge

Dated: April 15, 1980

No.80-1892

MAY 28 1981

ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1980

AARON CLINTON ATKINS, PETITIONER,

VS.

STATE OF MICHIGAN
(WILLIAM L. CAHALAN,
WAYNE COUNTY PROSECUTING ATTORNEY
AND
WILLIAM LUCAS, WAYNE COUNTY SHERIFF),
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM L. CAHALAN
Prosecuting Attorney
Wayne County
State of Michigan

WILLIAM LUCAS
Wayne County Sheriff

EDWARD REILLY WILSON, III
Counsel of Record
Principal Attorney, Appeals
(313) 224-5792

BY: ANNE B. WETHERHOLT (P-25635)
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, MI 48226
(313) 224-5827

RENAISSANCE PRINTING COMPANY, 76 W. ADAMS
9TH FLOOR, DETROIT, MICHIGAN 48226 — PHONE 964-3185

QUESTION PRESENTED

THE DECISION BY THE SIXTH CIRCUIT COURT OF APPEALS, HOLDING THAT THE REMEDY FOR A CLAIM OF DENIAL OF THE RIGHT TO A SPEEDY TRIAL MADE IN A PETITION FOR A WRIT OF HABEAS CORPUS FILED PRIOR TO TRIAL AND PRIOR TO CONVICTION IN THE STATE CRIMINAL CASE WAS TO ORDER THE STATE TO PROCEED TO TRIAL, NOT TO DISMISS THE STATE CRIMINAL CASE, WAS A CORRECT APPLICATION OF THE DECISIONS OF THIS COURT.

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AND
WILLIAM LUCAS, WAYNE COUNTY SHERIFF),
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Now comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan and William Lucas, Wayne County Sheriff, by Edward Reilly Wilson, III, Principal Attorney, Appeals, and Anne B. Wetherholt, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit issued on March 2, 1981 be denied.

OPINIONS BELOW

On April 15, 1980 the United States District Court for the Eastern District of Michigan, Judge Anna Diggs Taylor issued an opinion granting petitioner Aaron Clinton Atkins' pretrial-preconviction petition for a writ of habeas corpus, ordering him discharged from Wayne County Jail where he had been remanded to await trial on a charge of first degree murder, and dismissing the pending state murder case against him.

On March 2, 1981 the United States Court of Appeals for the Sixth Circuit issued an opinion which reversed the judgment of the federal district court, reinstated the state criminal charge of murder and ordered that the state trial commence within sixty days.

STATEMENT OF JURISDICTION

On March 2, 1981 the United States Court of Appeals for the Sixth Circuit issued an opinion which reversed the April 15, 1980 judgment of the United States District Court for the Eastern District of Michigan, reinstated the state criminal charge of murder and ordered that the state trial commence within sixty days. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and

> to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory processes for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This state criminal case had a lengthy procedural history in the state courts of Michigan. Respondent apologizes for the length of his statement of facts but believes a full recitation of facts is necessary to a full understanding of the issues presented by petitioner.

A. REMAND/BOND DECISIONS IN TRIAL COURT

Aaron Clinton Atkins was arrested and arraigned on January 22, 1979 on the charge of first-degree premeditated murder, MCL 750.316.

At the arraignment on the warrant on January 22, 1979, the arraigning magistrate remanded defendant on the murder first degree charge without bond, consistent with the Michigan Constitution of 1963, Art I, § 15, MCL 765.5 and Michigan Court Rule GCR 1963, 790. The next scheduled proceeding was preliminary examination.

The next day, on January 23, 1979, the defense counsel approached the Honorable Samuel C. Gardner, Chief Judge of Recorder's Court, with a motion to review the bond set by the arraigning magistrate. Judge Gardner orally designated Judge Dalton Roberson to hear this motion because Attorney Edward Bell was in the courtroom on another case and convenience dictated that judge hear the case. The motion was filed without notice to the prosecution. See MCL 765.3. The prosecutor handling the case discovered the case was being sent to Judge Roberson and managed to send another prosecutor to appear for him.

Judge Roberson had a report from the R.O.R. (Release on Recognizance) division of the court which recommended no change in status. The judge was informed of the defendant's prior record of violent felonies and the nature of this offense. However, Judge Roberson set bond at $50,000/2 sureties. He did not explain his exercise of jurisdiction in the cause, nor did he find that the arraigning magistrate abused his discretion, contrary to 790.7(d). (Transcript of 1-23-79).

No appeal was taken from that decision, because the People believed the examining magistrate, after hearing the proofs, could consider the question of bond.

A participant in the crime, Ronald Moore (Moon) was the main witness in the preliminary examination held January 31, 1979. Ronald Moore (Moon) testified that he had participated in the murder of Girard Tolbert. Atkins called the Goldfarb Bonding Agency to arrange for Tolbert's release (Preliminary Examination Transcript page 67-72) (hereinafter P.E.). Atkins mentioned to Moore that "Melvin had messed up shooting at somebody and messed up a hit or something of that nature" the "previous night" (P.E. 70). Moore and Atkins took Tolbert to a house on Monica, which was Melvin Wiggins' girlfriend's house (P.E. 73). When Moore went with Atkins to get some narcotics, Atkins told him, "the guy had to

be taken out," meaning "killed." (P.E. 74) because "he made some statements or something." (P.E. 75). Upon returning with a quarter of an ounce of raw heroin, Moore, Atkins and Wiggins took Tolbert to the basement (P.E. 80-81), subdued him, and injected heroin into him two times (P.E. 81-84). After the second injection, Tolbert just laid there. Nevertheless, Atkins told Wiggins to fill up the laundry tub and Moore, Atkins and Wiggins held Tolbert's head in the water for eight minutes (P.E. 84-85). Atkins told Moore and Wiggins to dispose of the body and they did (P.E. 85, 89). After hearing this testimony the examining magistrate, Judge Clarice Jobes, bound defendant over for trial on the charge of first degree murder and based on the proofs, ordered him remanded to jail, as authorized by the Michigan Constitution of 1963, Art 1, § 15, MCL 765.5 and GCR 1963, 790.1.

On February 6, 1979, Judge Evelyn Cooper, assigned as the trial judge, heard defendant's motion to reinstate the bond set by Judge Roberson, which alleged "there is no over-riding reason why the examining magistrate should over-rule Judge Roberson's previous decision." Judge Cooper instead ruled in a written order that 1) Judge Jobes lacked jurisdiction to disturb the bond set by Judge Roberson who was sitting as a Recorder's Court Judge and 2) that GCR 1963, 790.7(a) and (b) precluded her from disturbing the bond Judge Roberson set.

On the same day, February 6, 1979, the People filed an application for emergency leave to appeal Judge Cooper's decision to the Michigan Court of Appeals, along with a motion for immediate consideration and an emergency motion for a stay of proceedings. The court's written order was attached to the pleadings and filed in the Court of Appeals. The prosecution believed Judge Cooper was clearly erroneous in her interpretation of Michigan law: Judge Jobes, the examining magistrate, did have jurisdiction to consider anew the issue of bond

based on her assessment of the proofs. The prosecution also believed that Judge Cooper had the power to review the bond decision of Judge Jobes under GCR 1963, 790 and that the prosecution had the right under *People* v *Edmonds*, 81 Mich App 743 (1978) to introduce additional evidence to confirm that the remand was not an abuse of discretion. Judge Cooper's ruling that she had no jurisdiction precluded such proofs. In its emergency application for leave to appeal the prosecution included evidence it would have presented on the issue of bond. These proofs included the fact that a) defendant Atkins had a prior history of flight to avoid prosecution — he was previously charged with murder and fled to California where he was apprehended on February 3, 1975, b) he had three violent felony convictions in the past fifteen years and has the reputation of being a major level narcotics dealer in Detroit, GCR 1963, 790.5(5), c) the murder charge in the instant case involves the silencing of a potential witness against him, and d) the existence of a threat to the life of the principal prosecution witness, Ronald Moore, based on information that a $100,000 contract was let on his life. The prosecution requested the Court of Appeals to either remand the matter to Judge Cooper to examine the proof offered by the prosecution to determine if the examining magistrate abused her discretion or for the appellate court to examine the proof, review the magistrate's decision pursuant to GCR 1963, 790.7(b) and if there was no abuse of discretion, to remand defendant to the custody of the sheriff. Defense counsel submitted to a responsive brief in the Michigan Court of Appeals.

B. APPELLATE REVIEW AND ORDER OF REMAND

The Michigan Court of Appeals heard this matter on an emergency basis, GCR 1963, 806.5, and after due consideration of the trial court's written order and briefs by both par-

ties, the Court of Appeals in a peremptory order, authorized by GCR 1963, 806.5, 806.7 and 820, on February 9, 1979, Docket No. 43550, granted the People's motions and ruled:

> IT IS FURTHER ORDERED that the bond set by the trial court in this cause be, and the same is hereby CANCELLED and the defendant is hereby ordered remanded to the Wayne County Jail.

Defendant's application for leave to appeal this ruling to the Michigan Supreme Court was denied in Docket No. 62845.

C. PRETRIAL AND EVIDENTIARY TRIAL MOTIONS IN THE TRIAL COURT

Trial for defendant Atkins and co-defendant Wiggins was scheduled for April 5, 1979. On March 21, 1979 the trial court heard pretrial motions by both the prosecution and the defendants. Both motions were taken under advisement; the prosecution's motion to endorse witnesses was granted on March 29, 1979. A defense motion to suppress Mr. Atkins' criminal record was granted on March 29, 1979. At the same time the trial court refused to suppress the criminal record of a prosecution witness. This ruling was also the subject of an emergency application for leave to appeal taken on April 2, 1979. On April 4, 1979 the Michigan Court of Appeals ruled against Judge Cooper on the matter, Docket No. 44454. Upon defendant's application to the Michigan Supreme Court for leave to appeal that order, the Supreme Court modified the order to conform with Michigan Rule of Evidence (MRE) 609, Docket No. 63042.

Also on March 21, 1979 co-defendant Wiggins had made a motion for an evidentiary hearing. At the hearing both defense counsel participated, arguing entrapment and that

the search warrant was invalid and the resulting evidence should be suppressed. This motion was also taken under advisement on March 21st (Transcript of 3-21-79). On April 5, 1979, the day set for trial the motion had not yet been ruled on. When the prosecution presented a brief to defense counsel on its motion to admit testimony at trial on a matter which the prosecution was under no duty to give notice under *People* v *Hicks*, 70 Mich App 430 (1976), the trial court adjourned the trial without ruling on either this motion or defendant's pending motion. (Transcript of 4-5-79)

On May 14, 1979 the trial court ruled on defendant's search warrant motion by finding the warrant invalid and suppressed evidence as to both defendant Atkins and codefendant Wiggins. She also ruled the testimony the prosecution sought to present at trial was inadmissable. She set a new trial date of May 30, 1979. (Transcript of 5-14-79).

On May 18, 1979 the prosecution filed an emergency application for leave to appeal these decisions in the Michigan Court of Appeals, a motion for immediate consideration and a motion for a stay of proceedings. The prosecution raised three substantial issues: 1) the lack of standing by defendant Atkins to challenge the search warrant and gain suppression of evidence taken from codefendant Wiggins, 2) the decision finding the search warrant invalid, and suppressing of the telephone conversation seized under it, and 3) the refusal to admit the testimony of Levi Williams.

D. MICHIGAN COURT OF APPEALS ACTION ON PEOPLE'S APPEAL

On May 25, 1979 the Michigan Court of Appeals issued an order, dated May 24, granting the prosecution's application, staying all proceedings and ordering the time limits regarding appellate procedures be halved. The prosecution was

timely in compliance with the court rules, filing a timely claim of appeal on June 4, 1979 and timely brief on appeal on July 5, 1979. Defendant Atkins filed his brief on appeal on July 25, 1979. Oral argument was expedited and held in October 1979, the first month the Court of Appeals returned for sessions. The Michigan Court of Appeals issued its decision on April 16, 1980, reversing the trial court on the first issue and upholding her decision on the remaining two issues. On July 7, 1980 the Michigan Supreme Court denied the People's emergency application for leave to appeal on a 4-3 vote.

E. SECOND BOND/REMAND DECISION IN TRIAL AND APPELLATE COURTS

On August 18, 1979, the People were served with a trial court motion by defendant Atkins for release on bond alleging, that "the People have not made a good faith attempt to commence these proceedings," that "no court of this state has any jurisdiction over this matter due to the 180 day rule" citing MCL 750.131 et. seq. and that defendant was denied his right to a speedy trial, citing Michigan law.

Defendant had been incarcerated in the Wayne County Jail since approximately January 22, 1979.

Judge Evelyn Cooper granted defendant bond of $50,000, two sureties or 10% on August 30, 1979 in a written order.

The People filed for emergency leave to appeal and a motion for immediate consideration in the Michigan Court of Appeals, contending that the trial court's decision was clearly erroneous because she had no authority to grant bond. MCL 780.131 did not apply to a person incarcerated in Wayne County Jail, a pre-trial detention facility, not a penal institution. Moreover, the previous decision of the Court of Appeals

canceling defendant's bond became law of the case on the matter of bond under GCR 1963, 790, and could not be altered, especially by the lower level trial court. Further, the Court of Appeals had previously granted a stay of proceedings until it rendered its decision as to admissibility of evidence at trial. The People also argued that GCR 1963, 789 controlled the issue of speedy trial; defendant has *not* been incarcerated for six months using the time computations (and exclusions) of GCR 1963, 789.2.

Proceeding on an expedited basis as provided for by court rule and after examining the trial court's written order and briefs by both parties, the Court of Appeals on September 12, 1979, ruled in Docket No. 47064:

> IT IS FURTHER ORDERED that the order of the trial judge setting bond be, and is hereby set aside and the bond cancelled. Defendant is ordered remanded to the custody of the Wayne County Sheriff pursuant to this Court's order of February 9, 1979.

Defendant filed an emergency application for leave to appeal in the Michigan Supreme Court. The Michigan Supreme Court granted immediate consideration but denied leave to appeal on November 2, 1979, Docket No. 63825.

F. PETITION FOR WRIT OF HABEAS CORPUS

On November 19, 1979 defendant Aaron Clinton Atkins filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan.

Procedurally, the facts subsequent to filing the petition on November 19, 1979 show that this petition was referenced by Judge Taylor to Magistrate Paul Komives on November 26,

1979 for a recommendation (Docket Entry Number 2) (hereinafter D.E.).

Respondent William L. Cahalan received a copy of this Order of Reference. Respondent, through Anne B. Wetherholt, Assistant Prosecuting Attorney, called District Court on November 29, 1979 and talked with Ms. Fishman, clerk to Judge Taylor. The assistant prosecutor informed the clerk she wanted an opportunity to respond to the allegations; she was informed that if the petition was not to be dismissed, her office would be served with the pleadings and given an opportunity to respond. This respondent heard nothing more about this petition until served with a copy of the petition on March 6, 1980 and an order requiring a responsive pleading by March 28, 1980. (D.E. 9, 10, 11) Meanwhile, the Attorney General for the State of Michigan, who was *not* a proper party to this suit because petitioner was being held by Wayne County officials, not the State Department of Corrections, had been served on January 10, 1980 with an order requiring a responsive pleading by February 20, 1980. (D.E. 4) Without realizing he was not properly a party in this suit, an assistant attorney general filed an appearance and routine motion for enlargement of time on February 22, 1980 without filing any responsive pleadings (Vol. I of U.S. District Court transcript, April 7, 1980, pages 34-39) (hereinafter I). Petitioner objected to enlargement. (D.E. 8) On February 28, presumably having realized that Wayne County officials were the authorities detaining petitioner, Magistrate Komives ordered the Wayne County Sheriff and Wayne County Prosecutor be served and ordered to respond by March 28, 1980. (I. 36; D.E. 10) As indicated above, service was effected on March 6, 1980. Nevertheless, on March 10, 1980 Judge Taylor issued an order denying the Attorney General's motion for enlargement, noted that the petition was not subject to summary dismissal and ordered the Attorney General to show cause on April 7,

1980 "why the relief requested should not be granted." (D.E. 12; I. 36) Wayne County officials, who were the proper parties to this suit, were *never* served with this order. (D.E. 12). The record will confirm that Wayne County officials have never violated any order to file responsive pleadings. Moreover, Wayne County did file timely responsive pleadings on March 27, 1980 (D.E. 13 and 14) (despite the fact that the prosecution's appellate file of the numerous state proceedings in this matter was at that time comprised of *three volumes* of pleadings — each volume being approximately two inches thick.) Hence, the show cause order of March 19, 1980 was not applicable to Wayne County officials. Further, the only notice they received concerning this March 7, 1980 hearing was a verbal telephone request by a clerk from Judge Taylor's courtroom to Edward Reilly Wilson, Principal Attorney, Appeals, the week prior to the hearing, to send someone to appear on April 7th to discuss who was the proper party respondent. This person informed Mr. Wilson this was *not* a hearing on the merits (I. 32, 40). Accordingly, due to reliance on the district court's oral representation, the prosecutor's office (representing the Wayne County Prosecutor and Wayne County Sheriff) was "unprepared" on April 7th when the judge wanted argument on the merits. After petitioner's counsel argued on the merits on April 7th, the judge adjourned argument until April 14th so the respondent could "prepare" a response. At 4:00 p.m. on April 14th, respondent began its response. Upon completion of argument at about 5:24 p.m. the judge informed the parties that she would issue her opinion at 10:30 a.m. the next day, April 15, 1980. Her seventeen page opinion, granting Aaron Clinton Atkins' pretrial preconviction petition for a writ of habeas corpus, ordering him discharged from Wayne County Jail and dismissing the state criminal murder charge against him, was issued at that time. (Vol II of U.S. District Court transcript, April 14, 1980, page 41).

On April 18, 1980 respondent filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit. On March 2, 1981 the Sixth Circuit Court of Appeals issued an opinion which reversed the judgment of the district court, reinstated the state criminal charge of murder, and ordered that the state trial commence within sixty days.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BY THE SIXTH CIRCUIT COURT OF APPEALS, HOLDING THAT THE REMEDY FOR A CLAIM OF DENIAL OF THE RIGHT TO A SPEEDY TRIAL MADE IN A PETITION FOR A WRIT OF HABEAS CORPUS FILED PRIOR TO TRIAL AND PRIOR TO CONVICTION IN THE STATE CRIMINAL CASE WAS TO ORDER THE STATE TO PROCEED TO TRIAL, NOT TO DISMISS THE STATE CRIMINAL CASE, WAS A CORRECT APPLICATION OF THE DECISIONS OF THIS COURT.

Petitioner's argument that the decision by the Sixth Circuit Court of Appeals is incorrect and his reliance on *Barker* v *Wingo*, 407 US 514 (1972) and *Strunk* v *United States*, 412 US 434 (1973) totally ignores the fact that this Court has created a distinction between review of habeas corpus petitions filed prior to trial/conviction in the state court and claims brought after conviction in state court, and another distinction between remedies available to denial of speedy trial claims made prior to trial/conviction in the state court and claims made after conviction in state court. *Strunk* and *Barker* apply to *post* conviction claims alleging that a defendant was denied his right to a speedy trial. As such, they are *not* applicable to the instant situation.

Where, as in the instant case, a habeas corpus petition is filed *prior* to trial/conviction in the state court, principles of comity and federalism normally preclude federal intervention in state criminal proceedings. Hence, even though a state defendant may have raised the issue of the denial of a federal right in each level of the state's court system, the abstention doctrine requires he proceed to trial before he will be deemed to have exhausted his state remedies so as to permit a petition for a writ of habeas corpus to lie in federal court. This distinction is made abundantly clear from reading the case of *Carden* v *Montana*, 626 F2d 82 (9th Cir. 1980), *cert. den.* __ US __; 101 SCt 573; 66 LEd 2d 473 (1080). In *Carden* the Ninth Circuit Court of Appeals reversed the federal district court's order granting a pretrial/preconviction petition for a writ of habeas corpus and dismissing the state's criminal case. Even though petitioner had raised the speedy trial claim at each level of the state system, the exhaustion requirement had not been fulfilled so as to permit federal intervention because petitioners had not yet been to trial on the state charge. The remedy for their claim of denial of their right to a speedy trial was to proceed to trial, *not* to dismiss the state charges. See also *Moore* v *DeYoung*,, 515 F2d 437 (3rd Cir. 1975).

Closely coupled with this doctrine is the "prematurity" rule regarding claims of denial of the right to a speedy trial. In *United States* v *MacDonald*, 435 US 850 (1978), this Court emphasized its rule *against pretrial appeals* in criminal cases *on speedy trial grounds* because the factors stated in *Barker* v *Wingo, supra*, especially prejudice, could not be accurately measured before trial:

> Even if the degree of prejudice could be accurately measured before trial, a speedy trial claim nonetheless would not be sufficiently independent of the outcome of the trial to warrant pre-trial appellate review. The claim would be largely satisfied by an

> acquittal resulting from the prosecution's failure to carry its burden of proof. The double jeopardy motion in Abney was separable from the issues at trial because "[t]he elements of that claim are completely independent of [the accused's] guilt or innocence." 431 US, at 660, 52 LEd 2d 651, 97 S Ct 2034, since an acquittal would not have eliminated the defendant's grievance at having been put twice in jeopardy. In contrast, a central interest served by the Speedy Trial Clause is the protection of the fact-finding process at trial. The essence of a defendant's Sixth Amendment Claim in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crime charged. Normally, it is only after trial that the claim may fairly be assessed. 435 US at 859-860.
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> Allowing an exception to the rule against pretrial appeals in criminal cases for speedy trial claims would threaten precisely the values manifested in the Speedy Trial Clause. And some assertions of delay-caused prejudice would become self-fulfilling prophecies during the period necessary for appeal.
>
> There is one final argument for disallowing pretrial appeals on speedy trial grounds. As the Court previously has observed, there is nothing about the circumstances that will support a speedy trial claim which inherently limits the availability of the claim. See *Barker* v *Wingo*, 407 US, at 521-522, 530, 33 LEd 2d 101, 92 S Ct 2182.
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> 435 US at 862.

Although *MacDonald* involved an interlocutory appeal of a federal district court order, respondent believes the same

reasoning applies even more acutely to collateral review by pretrial/preconviction habeas corpus proceedings in which federal intervention to prevent a state trial on state criminal charges is sought. Moreover, the reasons stated in *MacDonald* for not hearing pretrial appeals seeking dismissal of charges on speedy trial grounds apply equally to pretrial habeas corpus petitions: the constitutional claim remains available after trial, the degree of prejudice cannot accurately be measured prior to trial, and the time necessary to challenge habeas corpus petitions in federal court and appeal erroneous dismissals of state cases by the federal courts on speedy trial grounds unnecessarily aids the prisoner's claims of delay by fueling his self-fulfilling prophesy. Such was the holding of *Carden* v *Montana, supra*, this court subsequently denying the petition for a writ of certiorari.

This does not mean, however, that a person claiming a pretrial/preconviction denial of his right to a speedy trial is without a remedy. In *Braden* v *30th Judicial Court of Kentucky*, 410 US 484 (1973) this Court concluded that the habeas corpus petitioner was entitled to raise the speedy trial claim prior to trial because the remedy he sought was to compel a good faith effort by the state court to bring him to trial on the criminal charge, *not* to litigate a speedy trial defense to the criminal charge:

> Petitioner does not, however, seek at this time to litigate a federal defense to a criminal charge, but only to demand enforcement of the Commonwealth's affirmative constitutional obligation to bring him promptly to trial. *Smith* v *Hooey*, 393 US 374, 21 L Ed 2d 607, 89 S Ct 575 (1969).
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> * * *
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> Moreover, petitioner made no effort to abort a state proceeding or to disrupt the orderly functioning of state judicial processes. He comes to federal court,

> not in an effort to forestall a state prosecution, but to enforce the Commonwealth's obligation to provide him with a state court forum.
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> 410 US at 489-491.

Under these particular circumstances federal habeas corpus action prior to trial would not jeopardize any legitimate interest of federalism. The Court later reiterated its position that the pretrial/preconviction habeas corpus petition was available *only* to compel, *not to prevent*, the state trial of state criminal charges:

> We emphasize that nothing we have said would permit the derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court. The contention in dissent that our decision converts federal habeas corpus into "a pretrial-motion forum for state prisoners," wholly misapprehends today's holding.
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> 410 US at 493.

Accordingly, the subsequent holding by the Supreme Court in *MacDonald* expressing the policy against pretrial appeals on speedy trial grounds where the remedy sought is dismissal of the criminal charges, is *wholly consistent* with *Braden*, and, as held in *Carden* v *Montana, supra*, is equally applicable to the instant situation where this petitioner sought federal intervention by way of a habeas corpus petition to litigate, prior to trial, a speedy trial defense to the state charges.

The Sixth Circuit Court of Appeals correctly recognized the law applicable to the instant facts. (See pages 16-21 including footnote 1 on page 16 of Appendix "A" contained in Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.)

> [T]he Speedy Trial Clause *does not,* either on its face or according to the decisions of this Court, *encompass a "right not to be tried"* . . .
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> 435 US at 861. (emphasis added)

CONCLUSION AND RELIEF

Thus, the Sixth Circuit Court of Appeals order, reversing the decision of the federal district court, reinstating the state criminal charge of murder, and ordering the state trial to commence within sixty days, was a correct application of the law governing pretrial/preconviction habeas corpus relief and claims of denial of the right to a speedy trial.

For the foregoing reasons, the State of Michigan, respondent herein, respectfully requests this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

WILLIAM L. CAHALAN
Prosecuting Attorney
County of Wayne
State of Michigan

WILLIAM LUCAS
Wayne County Sheriff

EDWARD REILLY WILSON, III
Counsel of Record
Principal Attorney, Appeals
(313) 224-5792

by: (s) ANNE B. WETHERHOLT
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
(313) 224-5827